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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PAUL CROOK, Plaintiff and Appellant, v. PACIFIC GAS & ELECTRIC COMPANY et al., Defendants and Respondents.	A132553 (Sonoma County Super. Ct. No. SCV-243344)

Plaintiff Paul Crook was terminated by his employer, defendant Pacific Gas & Electric Company (PG&E). After pursuing an unsuccessful grievance, he filed suit, alleging wrongful termination and breach of the collective bargaining agreement (CBA). When these claims were dismissed as precluded under the CBA, he filed an amended complaint alleging retaliatory termination, age discrimination, and defamation, the latter claim based on statements made during the grievance procedure. The trial court granted PG&E's motions for judgment on the pleadings, concluding the civil rights claims were barred by the statute of limitations and the allegedly defamatory statements were privileged. Finding no error in the trial court's reasoning, we affirm.

I. BACKGROUND

In a complaint filed against PG&E on August 8, 2008, Crook alleged he had been wrongfully terminated from employment with the company in January 2007. According to the complaint, one of Crook's duties with PG&E was "spiking" cables. On one occasion, he "followed the same procedures that he had always followed," but the cable

he spiked "was live and burnt out." Crook was thereafter terminated "for the pre-textual reason that he failed to follow safety guidelines before spiking the cable." Crook's union, the International Brotherhood of Electrical Workers, had filed a grievance challenging his termination pursuant to procedures specified in the CBA, but it was unsuccessful. The complaint pleaded causes of action for wrongful termination and breach of the CBA governing his employment, alleging he was fired without good cause.

PG&E removed the action to federal court and moved to dismiss. The district court granted the motion, concluding Crook's claims challenging the grounds for his termination were "precluded by the finality provisions in the collective bargaining agreement." By order of February 20, 2009, the district court permitted Crook to file an amended complaint and remanded the matter to the superior court.

The first amended complaint (FAC) contained three causes of action: retaliatory and discriminatory termination in violation of civil rights laws and defamation, the latter based on statements made in the course of the grievance proceedings. Crook alleged he had presented his claims for discrimination to the Department of Fair Employment and Housing in October 2007, and was issued a right to sue letter in November of that year.

Upon remand, PG&E filed a demurrer to the FAC. The notice of motion stated four grounds for demurrer, three raising the statute of limitations and the fourth claiming a failure to exhaust administrative remedies. The notice stated that each ground was raised under Code of Civil Procedure section 430.10, subdivision (a), which permits a defendant to demur on grounds of lack of subject matter jurisdiction. The trial court overruled the demurrer on the ground the three statute of limitations arguments could not be raised under subdivision (a), disregarding Crook's waiver of the error. The court's order did not address the merits of PG&E's arguments. When PG&E corrected the notice of demurrer and tried again, the trial court overruled the demurrer on the ground it was repetitive of the first demurrer. Again, the court did not reach the merits of PG&E's arguments.

Shortly thereafter, PG&E filed a motion for judgment on the pleadings, again raising the statute of limitations and failure to exhaust administrative remedies. The court

granted the motion in part, concluding the causes of action relating to Crook's termination were barred by the statute of limitations because they did not relate back to the original complaint. The court denied the same relief as to the defamation cause of action. PG&E then filed a second motion for judgment on the pleadings, arguing the defamation claim failed to state a claim for various reasons. The trial court granted this motion on the ground communications made during the grievance proceedings were subject to the litigation privilege of Civil Code section 47, subdivision (b). Judgment was entered for PG&E.[1]

II. DISCUSSION

Crook argues PG&E was precluded by Code of Civil Procedure section 438, subdivision (g) from raising the statute of limitations argument in its motion for judgment on the pleadings because it had already raised the argument in the prior unsuccessful demurrers. On the merits, he argues the trial court erred in granting the motions for judgment on the pleadings because the two civil rights causes of action related back to the original complaint and the defamation claim was not barred by the litigation privilege.

"In an appeal from a motion granting judgment on the pleadings, we accept as true the facts alleged in the complaint and review the legal issues de novo. 'A motion for judgment on the pleadings, like a general demurrer, tests the allegations of the complaint . . . , supplemented by any matter of which the trial court takes judicial notice, to determine whether plaintiff . . . has stated a cause of action.' " (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166.)

A. *The Prior Demurrers*

Code of Civil Procedure section 438, subdivision (g) precludes a party from making a motion for judgment on the pleadings on the basis of an argument raised in an overruled demurrer unless "there has been a material change in applicable case law or

[1] Although Crook's notice of appeal referred only to the order granting the second motion for judgment on the pleadings, we construe the notice as an appeal from the trial court's entry of judgment. (See *In re Joshua S.* (2007) 41 Cal.4th 261, 272 [notices of appeal are to be liberally construed].)

statute since the ruling on the demurrer."[2] Crook contends the statute was violated by PG&E's first motion for judgment on the pleadings because PG&E had twice raised the statute of limitations in its unsuccessful demurrers.

Assuming PG&E's motion violated Code of Civil Procedure section 438, subdivision (g), a violation of that statute provides no basis for reversing a judgment that was otherwise properly entered. (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 603 (*Thomson*).) In reaching this conclusion, the *Thomson* court reasoned, "[A] judgment may not be set aside unless the challenged error results in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Where, as here, a motion for judgment on the pleadings is granted based upon a question of law, there is no miscarriage of justice if the court's ruling on the legal merits is correct." (*Ibid.*) As an alternative basis for its ruling, the court noted, "[A] trial judge may reconsider and correct erroneous orders independent of the statutory limitations imposed on reconsideration motions" and concluded, "The pertinent question therefore is whether the trial court's ruling was substantively correct." (*Ibid.*)

Crook argues *Thomson* is distinguishable because, in that case, the trial court was substantively correct, whereas in this case the trial court erred in granting the motion for judgment on the pleadings. The argument effectively concedes the issue, since any conclusion about the correctness of the trial court's judgment can only be made after an examination of its merits. Accordingly, finding *Thomson* controlling, we turn to the trial court's substantive rulings.

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[2] Code of Civil Procedure section 438, subdivision (g) states a motion for judgment on the pleadings may be made "even though either of the following conditions exist: [¶] (1) The moving party has already demurred to the complaint or answer, as the case may be, on the same grounds as is the basis for the motion provided for in this section and the demurrer has been overruled, provided that there has been a material change in applicable case law or statute since the ruling on the demurrer. [¶] (2) The moving party did not demur to the complaint or answer, as the case may be, on the same grounds as is the basis for the motion provided for in this section."

B. *Relation Back*

Crook acknowledges his civil rights claims are, on their face, barred by the statute of limitations, but he contends they are saved by the "relation-back doctrine."

"The relation-back doctrine deems a later-filed pleading to have been filed at the time of an earlier complaint which met the applicable limitations period, thus avoiding the bar. In order for the relation-back doctrine to apply, 'the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one.' " (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278 (*Quiroz*).) "The relation-back doctrine typically applies where an amendment identifies a defendant previously named as a Doe defendant [citation] or adds a new cause of action asserted by the same plaintiff on the same general set of facts." (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1549–1550.)

The requirement that the new cause of action depend upon the "same general set of facts" anticipates continuity in the plaintiff's factual theory of the case. A cause of action that applies a new *legal* theory to the same facts normally relates back. A new cause of action that changes the plaintiff's *factual* theory of the case, however, does not. Decisions refer to such a change in a plaintiff's factual theory as the allegation of a "new accident" to explain the "same injuries." The classic case is *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342 (*Coronet*), in which the initial complaint alleged the decedent had been electrocuted while using a defective hair dryer. The amended complaint, in contrast, identified the electrocuting instrumentality as a lamp socket and switch and named as a defendant, for the first time, the manufacturer of these items. (*Id.* at p. 344.) The court held the relation-back doctrine inapplicable because the two pleadings alleged different accidents and different instrumentalities. As the court explained, "The difference between being electrocuted by a hair dryer and being electrocuted by a table lamp is as great as being electrocuted by the hair dryer and being poisoned by some improperly processed food found on the kitchen shelf. Although they relate to a single death at a single location they are different 'accidents' and involve

different instrumentalities." (*Id.* at p. 347.) The same reasoning has repeatedly been used to deny application of the relation-back doctrine in similar circumstances. (*Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 152, 154 [initial complaint alleged the plaintiff had become sterile due to use of a prescription medicine, while the amended complaint alleged sterility from use of an intrauterine device]; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230–231 [initial complaint alleged one particular act of attorney malpractice during a litigation, while the amended complaint alleged an entirely different act of malpractice during the same litigation]; *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 202, 205 [original complaint alleged a wrongful demotion, while the amended complaint alleged a wrongful termination, declining to follow *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960].)

Kim v. Regents of the University of California (2000) 80 Cal.App.4th 160 (*Kim*), which relied on *Coronet* in concluding the claims of an amended complaint did not relate back to the original complaint, is essentially indistinguishable from the present case. The plaintiff in *Kim* was terminated from unionized employment. In her initial complaint, she alleged violation of overtime provisions of the Labor Code and breach of the CBA, the latter claim challenging the validity of the stated grounds for her termination. (*Kim,* at pp. 162–164.) In the third amended complaint, she added a claim for age discrimination, alleging for the first time she had been replaced by two younger employees. (*Id.* at p. 168.) In finding her age discrimination claim barred by the statute of limitations, the court held, "While there is just one employer and one termination, the wrongful conduct described in the discrimination claim does not arise out of the same set of facts that support Kim's contractual and overtime claims. There was nothing in the first three pleadings concerning disparate treatment, intentional discrimination, Kim's age or comments or actions related to her age—and no facts concerning replacement hires, let alone their relative ages." (*Id.* at p. 169.)

Crook's civil rights causes of action similarly rest on different facts than the claims in his initial complaint. In the original complaint, there was no mention of retaliation or age discrimination. Rather, the factual premise for Crook's wrongful

termination and breach of the CBA causes of action was his claim PG&E lacked good cause for his termination because he was following proper procedures when the incident leading to his termination, the "spiking" of an electrical cable, occurred. It was only in the FAC that Crook added allegations of retaliation and age discrimination, shifting the focus of his causes of action from the spiking of the cable to a series of other matters that allegedly motivated his termination. As in *Kim*, there was nothing in Crook's original complaint about PG&E's motive in terminating him, let alone the type of unlawful motives attributed to the company in the FAC. Accordingly, the civil rights causes of action did not rest on the same general set of facts, and the relation-back doctrine did not preserve their timeliness.

Crook contends *Kim* is distinguishable because he alleged in the original complaint his termination was "pre-textual." While it is true he used this word in the original complaint, it contained no allegation of PG&E's purported true motive, let alone an allegation the true motive was unlawful and actionable in itself. Rather, the gravamen of the original complaint was PG&E's lack of justification for terminating Crook, since he followed proper procedures in spiking the cable. Crook also contends there was no indication he intended to abandon his discrimination claim, unlike the plaintiff in *Kim*, but the inference of abandonment was not the central basis for the *Kim* court's reasoning, as discussed above.

Crook further argues a change in legal theory does not preclude application of the relation-back doctrine, but that principle applies only when the new legal theory depends upon the same general set of facts. Crook's new theories required the pleading of an entirely new and different set of facts.

Crook cites a number of cases, arguing they support application of the relation-back doctrine here, but each is distinguishable. In *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, discussed at length in Crook's opening brief, the court applied the relation-back doctrine because the facts pleaded in the amended complaint were sufficiently similar that the defendant had adequate notice from the original complaint. (*Id.* at p. 277.) As

noted above, PG&E had no notice from Crook's original complaint that he contended his termination was unlawfully motivated, since there was no mention of motive in the that complaint. In *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, the Supreme Court concluded the new facts pleaded in the amended complaint did not involve a "significantly distinct cause of action." (*Id.* at p. 584.) For the reasons discussed above, Crook's new causes of action were quite distinct from his original allegations. Finally, the plaintiff in *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, was permitted to amend the complaint to allege an additional cause of action based on facts occurring after the filing of the original complaint. Unlike Crook, the plaintiff did not attempt to recharacterize events that had already been pleaded in the original complaint.[3] The other cases cited by Crook are similarly distinguishable.

Because we find the retaliation and discrimination causes of action barred by the statute of limitations, we do not consider PG&E's argument of failure to exhaust administrative remedies.

C. *The Litigation Privilege*

Crook's union filed an unsuccessful grievance on his behalf. His defamation cause of action was based on the allegation, "During the grievance process, PG&E, through its employees in the course and scope of their employment, made defamatory comments about PLAINTIFF, including but not limited to that PLAINTIFF failed to follow safety protocol that he was trained on and that he intentionally disregarded his job duties. These comments were given orally and then published in the grievance materials."

Civil Code section 47, subdivision (b) extends an absolute privilege to communications made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable by [mandate]." In *Wallin v. Vienna*

[3] There is some question about the validity of the holding in *Honig*, which was rejected by *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 202, 205. We need not take sides in the conflict.

Sausage Manufacturing Co. (1984) 156 Cal.App.3d 1051 (*Wallin*), the court held that communications made in connection with a collective bargaining grievance procedure concerning an employee's termination are privileged under section 47, subdivision (b)(4) because such a procedure is reviewable by mandate under *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802 (*Anton*). (*Wallin*, at p. 1055.)

Crook argues *Wallin* limited application of the privilege to grievance procedures reviewable by writ of mandate and contends "there is no evidence in the record that review by writ is available with regard to the collective bargaining agreement governing Crook's employment." The argument misunderstands *Wallin.* While it is true grievance procedures must be reviewable by writ of mandate to qualify for the privilege under Civil Code section 47, subdivision (b), *Wallin* held that writ review is available for all such grievance procedures affecting the right to employment, applying *Anton*. In that case, a physician's hospital privileges were revoked pursuant to the hearing procedures adopted by the hospital. (*Anton*, *supra*, 19 Cal.3d at pp. 809–812.) The physician filed a writ of mandate challenging the suspension. The Supreme Court held that review by administrative mandate under Code of Civil Procedure section 1094.5 is not limited to governmental agency decisions but, quoting the statute, extends to the review of any decision " 'made as the result of a proceeding in which *by law* [1] a hearing is required to be given, [2] evidence is required to be taken and [3] discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . . .' " (*Anton*, at pp. 814, 816.)

Wallin reviewed the characteristics of a typical collective bargaining agreement grievance procedure and determined they satisfied the requirements of Code of Civil Procedure section 1094.5 and *Anton*, concluding, "We do not suggest that every decision of a grievance committee operating under similar contracts is so reviewable. However, when the decision of such a tribunal affects a fundamental right such as the right to employment, California courts have historically intervened to insure that the loss of that right was accomplished through a procedure that was fundamentally fair." (*Wallin*,

supra, 156 Cal.App.3d at p. 1056.) The provisions of the CBA governing Crook's grievance procedure are materially indistinguishable from those in *Wallin.*[4]

Crook contends the procedure in his CBA is not covered by *Wallin* because it includes a provision for arbitration of the grievance committee's conclusion. Arbitration decisions, he argues, are reviewable by appeal under Code of Civil Procedure section 1281.2, rather than under section 1094.5. *Wallin* anticipated and rejected this argument, pointing out, "If the hearing is viewed as being prefatory to arbitration proceedings pursuant to title 9 of part 3 of the Code of Civil Procedure (Code Civ. Proc., § 1280 et seq.), it is absolutely privileged as a statement made during judicial or official proceedings authorized by law. This privilege attaches if 'the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.' " (*Wallin, supra,* 156 Cal.App.3d at p. 1056, fn. 5.) While this observation may be dictum, as Crook contends, we find its reasoning persuasive. Such communications would be privileged to the same extent as the communications in any other private arbitration proceeding.[5] (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 649 [statements made during private contractual arbitration procedure are subject to Civ. Code, § 47 privilege].)

Crook also contends the application of the privilege is a matter of fact, not law. That is true with respect to certain communications made outside of, but related to, proceedings covered by Civil Code section 47. For example, the primary case relied on by Crook, *Action Apartment Assn., Inc. v. City of Santa Monica, supra,* 41 Cal.4th 1232,

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[4] In a motion for judicial notice, PG&E asked us to take notice of a copy of the CBA governing Crook's employment. When ruling on the motion, we deferred decision on this document. Because a copy of the CBA has already been included in the appellant's appendix without objection from either party, we deny the request for judicial notice.

[5] As for Crook's argument the actionable communications were not made in an arbitration but in a grievance procedure preceding arbitration, communications made in anticipation of a privileged proceeding are also privileged. (E.g., *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.)

concerned statements made in advance of the filing of litigation. (*Id.* at p. 1251.) Crook's defamation cause of action is not based on such communications. Instead, he alleges the individual defendants made the actionable communications "[d]uring the grievance process." Such communications are privileged under section 47 as a matter of law.

III. DISPOSITION

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.